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Supreme Court, U.S.
FILED
MAY 3 1991
OFFICE OF THE CLERK

NO. 90-1534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GIL HOLLINGSWORTH,

Petitioner,

V.

TEXAS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court should become involved in a case involving purely state law disputes, where (a) the petitioner fails to raise a substantial "federal" claim; and (b) there is an independent and adequate state law basis for decision?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the State of Texas, Garry Mauro, in his capacities as Commissioner of the General Land Office and Chairman of the Board for Lease of University Lands, and the Board for Lease of University Lands, submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Court of Appeals for the Third Supreme Judicial District of Texas, at Austin, in its opinion in its Cause No. 3-89-066-CV, accurately summarizes the procedural history of this case. However, because Petitioner Hollingsworth makes numerous misstatements of fact or law in the "Statement of the Case" contained in his Petition for Writ of Certiorari which potentially bear on the issues before the

Court, Respondents feel compelled to supplement the Texas court of appeals' opinion in response to some of those misstatements.

Petitioner Hollingsworth incorrectly describes the case before this Court in that he fails to recognize it for what it is - a suit to quiet title or, alternatively, for declaratory judgment relief. Although initially brought as a declaratory judgment suit, Respondents later amended their pleadings[1] to assert primarily a suit to quiet title. Through said action, Respondents requested the Texas trial court to remove the cloud placed on Respondents' title to the oil and gas underlying the lands at issue by Petitioner Hollingsworth's "Applications for Prospecting Permits" [2] on file in the Deed Records of the various County Clerk's Offices where such lands are located.

While Petitioner Hollingsworth correctly describes District Court Judge Hume Cofer's initial concerns regarding the trial court's jurisdiction to hear the parties' dispute, it is quite obvious that those same concerns were satisfied after the trial of the case and all the parties (including Respondents and Petitioner) had been provided every opportunity to fully develop their respective claims and legal theories, including the right after trial to amend their pleadings so as to conform with the issues tried before the court at the trial. It was then that Judge Cofer correctly realized that statutory compliance with Texas statutory law required Land Commissioner Mauro to do exactly what he had done with regard to Petitioner Hollingsworth's Applications, that is, refuse to file them.

Petitioner Hollingsworth correctly states at pages 15 and 16 of his Petition for Writ of Certiorari that he raised

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[1] See Appendix A, pages 1-3 ("Plaintiffs' Second Amended Original Petition").

[2] Sometimes hereinafter referred to as "Petitioner Hollingsworth's Applications" or simply the "Applications".

before the trial court a due process claim based on the Land Commissioner's "alleged refusal" to grant him an administrative hearing under the Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat. Ann. art. 6252-13a (Vernon 1991) (hereinafter "APTRA")[3], and an alternative claim that Land Commissioner Mauro has not made a proper "final decision" under the APTRA, and that the district court therefore lacked jurisdiction over the alleged declaratory judgment action[4]. However, what Petitioner Hollingsworth conveniently fails to mention to the Court is that in his last written pleading entitled "Written Arguments of Defendant Gil Hollingsworth" (Appendix C, pages 1-3) filed with the trial court after the trial but prior to judgment, he decided to waive the above mentioned claims against Respondents and totally submit to the jurisdiction of the court by expressly requesting the court to declare Sections 52.221 through 52.252 of the Texas Natural Resources Code (Vernon 1978)[5] to be applicable to Permanent University Fund lands and to compel the Land Commissioner to issue the requested oil and gas prospecting permits.

Finally, even if Petitioner Hollingsworth did not fully submit to the jurisdiction of the trial court, it is clear, as Respondents intend to establish herein, that the APTRA is not applicable in a suit to remove cloud on title and thus, Petitioner's argument of denial of due process has no validity.

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[3] See Appendix F to Petitioner Hollingsworth's Petition for Writ of Certiorari ("Defendant, Gil Hollingsworth's First Amended Answer" filed with the trial court on April 20, 1988, four months after the trial).

[4] See Appendix B, pages 1-3 ("Supplemental Answer of Defendants Bryce E. Evans and Gil Hollingsworth" filed with the trial court on April 25, 1988).

[5] Sometimes hereinafter referred to as "the prospecting permit statutes".

REASONS FOR DENYING THE WRIT

A. This Case Presents No Federal Questions.

Respondents brought in the trial court what is commonly referred to as a "suit to quiet title." Respondents urged in each of the courts below that the action of Petitioner Hollingsworth in filing the Applications on Respondents' lands in the various Texas counties where such lands are located created a cloud on Respondents' title to the oil and gas under those lands and deprived (and indeed continues to deprive, pending the finality of the Texas Supreme Court's decision herein) Respondents the right to lease their oil and gas under such lands in accordance with existing and valid Texas statutes. Tex.Educ. Code Ann. §§ 66.61-66.80 (Vernon 1972 and Vernon Supp. 1991); *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. - El Paso 1986, writ ref'd n.r.e.).

The evidence in the trial court (the testimony of five witnesses and over 200 exhibits) showed that Petitioner has filed Applications for Prospecting Permits in the Deed Records of the various County Clerk's Offices in Texas covering approximately 70,000 acres of State of Texas lands, more specifically Permanent University Fund lands, and that such filings as a matter of law constitute a "cloud" upon the state's title to such lands.

A cloud upon title has been defined as: a semblance of title, either legal or equitable, or a claim of a right in real property appearing in some legal form, which, in fact, is invalid or which it would be inequitable to enforce. *Daugherty v. Garrett*, 336 S.W.2d 642 (Tex.Civ.App. - San Antonio 1960, writ dism'd w.o.j.); *Best Investment Co. v. Parkhill*, 429 S.W.2d 531, 534 (Tex.Civ.App. - Corpus Christi 1968, writ dism'd). More concisely stated, a cloud on title is a title or encumbrance apparently valid, but in fact invalid. *Heath v. First Nat. Bank of Cleburne*, 32 S.W. 778 (Tex.Civ.App. 1895, no writ); *Dalton v. Allen*, 56 S.W.2d

205 (Tex.Civ.App. - Amarillo 1932, writ dism'd); *Temple Trust Co. v. Logan,* 82 S.W.2d 1017 (Tex.Civ.App. - Amarillo 1935, no writ). As Judge Cofer correctly ruled in the trial court below, Petitioner Hollingsworth's Applications on file with the various Texas counties clearly fall within the above definitions of "clouds on title". Petitioner Hollingsworth's Applications have made Respondents' oil and gas minerals under the subject acres unmarketable and until all appeals have been exhausted and Judge Cofer's judgment declaring such applications of no force and effect becomes final, the title to such minerals will remain incumbered or clouded.

It was Petitioner's position in the Texas courts that his Applications on file with the various Texas counties gave him the right to obtain oil and gas leases on Permanent University Fund lands by virtue of the leasing statutes in Tex.Nat.Res. Code Ann. §§ 52.221 - 52.252 (Vernon 1978). This very question was before the Texas courts in *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. - El Paso 1986, writ ref'd n.r.e.), wherein the Texas court of appeals stated at p. 233:

> *The permit provisions only apply to public land which is not university or school fund land.* . . . This is evidenced by the specific nature of the statutes applying to the lease/sale of school/university fund land. Tex.Nat.Res. Code Ann. sec. 32.061 (Vernon 1978); Tex.Educ. Code Ann. sec. 66.64 (Vernon 1972). (Emphasis added)

And at p. 234:

> The 1979 act did not attempt to prescribe rules in the same area of law as the permit leasing statutes. What we view here are different parts of a system of legislation upon the same general subject. *The university fund land statutes provide for the bid process and*

> *vest control of such land in the board created for that purpose.* The permit leasing statutes are general in that they apply to all surveyed and unsurveyed state land. *The statutes relating to the lease of permanent university fund land are specific.* (Emphasis added)

The *Allen* case is clear authority that Petitioner Hollingsworth acquired no interest in the Permanent University Fund lands at issue in this case, and that his Applications for Prospecting Permits have no force and effect,[6] and that a judgment entered to that effect to remove the cloud on Respondents' title to the oil and gas under such lands was proper.

Petitioner has raised the issue that the Texas courts lack jurisdiction to hear Respondents' quiet title action because the General Land Office of the State of Texas has never evaluated the Applications on their merits as required by §§ 52.221 through 52.252 of the Texas Natural Resources Code (Vernon 1978) (the "prospecting permit statutes") and Tex.Rev.Civ.Stat. Ann. art. 6252-13a (Vernon Supp. 1991) ("APTRA"), thereby depriving him of "due process of law." There is simply no merit to this argument. All parties agree that Petitioner's Applications cover Permanent University Fund lands and as recognized by the Texas courts of appeals in both *Allen* and in this case,[7] there exist separate specific oil and gas leasing statutes covering the

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[6] Petitioner Hollingsworth, through counsel, recognized the controlling effect of *Allen* with respect to Permanent School Fund and Permanent University Fund lands, early on, as evidenced by 1) his First Motion for Continuance filed with the trial court (a copy of which is attached hereto as Appendix D), wherein he admitted that *Allen*, and this lawsuit involved identical issues, and 2) the statements of his counsel, Ronald O. Holman, at the trial of said cause, wherein he admitted the controlling effect of *Allen*. See Appendix E.

[7] See Appendix C to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 5-39.

leasing of such lands. There was simply nothing to evaluate with regard to Petitioner Hollingsworth's Applications once it was determined that all the lands covered thereby were university lands. The applicable specific leasing statutes covering the Permanent University Fund lands are found at Tex.Educ. Code Ann. §§ 66.61-66.80 (Vernon 1972 and Vernon Supp. 1991). The Board for Lease of University Lands has controlled the leasing of the types of land (Permanent University Fund lands) at issue in this cause for over 50 years. This was expressly recognized by the Texas Court of Appeals in *Allen*, at p. 235 of its opinion:

> The statutes relating to the board for lease of university lands and the statutes relating to the lease of school land and the School Land Board are *mandatory, as they use exclusive language which vests control of public school land and university land in their respective boards of control.* (Emphasis added).

Because there are applicable leasing statutes and specific procedures to be followed in leasing the lands in question, the Land Commissioner's action in refusing to accept Petitioner's Applications was quite proper. As recognized in *Allen,* at p. 233:

> A commissioner of the General Land Office has no authority except that conferred on him by law. *State v. Robison,* 119 Tex. 302, 30 S.W.2d 292 (1930).

Stated simply, the Land Commissioner had no authority or jurisdiction to issue prospecting permits on any of the lands in question since there were separate specific statutes governing the proper methods for leasing such lands.

Finally, Respondents find it necessary to inform the Court that even if it were to be assumed that *Allen* had never been decided, and assuming further that Petitioner

Hollingsworth were correct in his argument that the Land Commissioner was not only required to "file" the Applications but also to hold a formal administrative hearing under the APTRA,[8] Petitioner Hollingsworth's remedy under Texas law would have been to directly petition the Texas Supreme Court to issue a writ of mandamus against the Land Commissioner of the General Land Office ordering him to do so, instead of seeking a declaratory judgment from the Travis County District Court. *Theisen v. Robison*, 117 Tex. 489, 8 S.W.2d 646 (1978); *Duval Corp. v. Sadler*, 407 S.W.2d 493 (Tex. 1966); *Superior Oil Company v. State*, 458 S.W.2d 55 (Tex. 1970). Thus, even under the above assumed facts, this Court would lack jurisdiction to hear this appeal.

B. Petitioner Hollingsworth Was Provided Full Due Process By The Trial Court And Texas Court Of Appeals.

If due process is what Petitioner Hollingsworth wanted from the State of Texas, due process is exactly what he received. The trial on the merits in the trial court below was extensive and exhaustive. Respondents and Petitioner tendered the testimony of numerous witnesses and offered 52 exhibits and 155 exhibits, respectively, all of which were admitted into evidence at the trial. Counsel for the parties were also provided the opportunity to present before the trial court both opening and closing arguments, as well as extensive post-trial briefing in support of their respective claims. As evidenced by the parties' extensive pleadings filed with the trial court before and after trial, Judge Cofer's deliberations and rulings, and the extensiveness of the court of appeals' opinion, it cannot seriously be questioned that every factual and legal issue presented by the parties was thoroughly explored and canvassed, and the record, as compiled, was complete.

[8] Petitioner Hollingsworth never formally requested an administrative hearing before the Land Commissioner and thus, no "contested case" under the APTRA was ever triggered.

Petitioner Hollingsworth, through his various able attorneys of record, was afforded, by the Texas Rules of Civil Procedure, the maximum protections required by law: the right to take part in extensive discovery, to present testimony, to cross-examine all the State's witnesses, to present both written and oral argument to the Texas courts and provided with not just one, but two detailed opinions[9] addressing the parties' factual and legal disputes. Two separate Texas appellate courts have determined that the prospecting permit statutes do not apply to Permanent University Fund lands. *Allen* and *State v. Hollingsworth,* 784 S.W.2d 461 (Tex.App. - Austin 1989, writ denied). The Land Commissioner simply had no authority to issue prospecting permits for the lands at issue in this case. Because he was lacking in this authority, the Land Commissioner's refusal to accept Petitioner's Applications for filing was proper and did not constitute a violation of Petitioner Hollingsworth's due process rights. Petitioner and Respondents have been in agreement throughout these proceedings that Petitioner's Applications covered only university lands.

In summary, the relief Petitioner Hollingsworth requests from this Court is meaningless. In effect, Petitioner Hollingsworth is asking this Court to remand this cause to the Land Commissioner so that a formal administrative hearing can be held. If this Court were to grant such relief, the Land Commissioner would have no choice but to apply the law as construed by the two Texas courts of appeals in *Allen* and *State v. Hollingsworth* and again deny Petitioner Hollingsworth's Applications. Simply stated, Petitioner Hollingsworth is requesting this Court to do a useless thing. The Court should waste no time in denying this request.

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[9] See Appendix F (letter from Judge Hume Cofer dated September 15, 1988, to all counsel of record announcing his ruling in the case) and Appendix C to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 5-39).

C. The Texas Supreme Court Provided Petitioner Hollingsworth Due Process.

Petitioner Hollingsworth argues that the alleged "ex parte communication" to the Texas Supreme Court by Land Commissioner Mauro's November 30, 1990 letter[10] "rendered the court unable to afford Petitioner a fair and impartial hearing". As previously argued by Respondents at pages 2-8 of this brief, the well-settled law of the State of Texas clearly favors the trial court's and court of appeals' decisions in this matter, as well as the Texas Supreme Court's decision to uphold those lower courts' rulings regarding the validity of Petitioner Hollingsworth's Applications for Prospecting Permits. Contrary to Petitioner Hollingsworth's assertions, Land Commissioner Mauro's letter of November 30, 1990, could not and clearly did not, prejudice his rights. As pointed out by Land Commissioner Mauro in his subsequent letter to the Texas Supreme Court dated January 18, 1991[11] not only was the November 30, 1990 letter to that same court promptly sent to Petitioner's counsel of record at the time, Messrs. Broadus A. Spivey and Paul E. Knisely, but indeed, said counsel was informed of the content of said letter and of the Land Commissioner's intent to file the letter with the Texas Supreme Court before it was actually delivered to the Court. Further, Petitioner's arguments regarding the propriety or alleged prejudicial effect of Land Commissioner Mauro's November 30, 1990 letter were presented to the Texas Supreme Court in "Petitioner Hollingsworth's Motion to Sever and Motion for Rehearing."[12] In that motion, Petitioner Hollingsworth correctly pointed out to the Texas Supreme Court, as Land Commissioner Mauro had previously in his November 30,

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[10] See Appendix H to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 54-57.

[11] See Appendix I to Petitioner Hollingsworth's Petition for Writ of Certiorari, pages 59-61.

[12] See Appendix G, pages 3-7.

1990 letter, that the alleged fraudulent conveyances referred to by Land Commissioner Mauro in said letter were limited to Mr. Bryce E. Evans, the other Petitioner before the Texas Supreme Court, and that Petitioner Hollingsworth was not in any way implicated in any unlawful or questionable activity regarding the subject Applications. Petitioner Hollingsworth's Motion for Rehearing was overruled and his request for severance denied as they should have been, based on the well-settled law that Land Commissioner Mauro was unauthorized to issue prospecting permits on university lands. See *Allen* and the court of appeals' opinion below.

CONCLUSION

There is nothing in Petitioner Hollingsworth's petition meriting review. This appeal does not present a federal question. Respondent's suit in the trial court was a suit to remove cloud on title, and Petitioner Hollingsworth, who was represented by able counsel every step of the way through the Texas judicial system, was provided due process as required by law.

Respectfully submitted,

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APPENDIX A

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	§	201ST JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION

With leave of Court, COME NOW, the State of Texas, the School Land Board, the Board for Lease of University Lands, the Board for Lease of the Department of Corrections, along with Garry Mauro, in his capacity as Commissioner of the School Land Board, Chairman of the Board for Lease of University Lands, and Chairman of the Board for for Lease of the Department of Corrections, Plaintiffs in the above-entitled and numbered cause, represented herein by Jim Mattox, Attorney General of the State of Texas, complaining of Bryce E. Evans and Gil Hollingsworth, Defendants, and for cause of action would show the Court as follows:

I.

Process has been previously served upon Defendants Bryce E. Evans and Gil Hollingsworth and answers and cross-actions have been filed in behalf of the Defendants.

II.

A. The Plaintiffs herein have authority to lease certain State lands and/or minerals under the following statutory enactments:

1. School Land Board - Tex. Nat. Res. Code §§ 32.001-32.111 and §§ 52.001 - 52.153 (Vernon 1978 and Vernon Supp. 1988)

2. University Board of Lease of University Land - Tex. Education Code §§ 66.61 - 66.80 (Vernon 1978 and Vernon Supp. 1988)

3. Department of Corrections - Tex. Nat. Res. Code §§ 34.001 - 34.185 (Vernon Supp. 1988)

The above-cited leasing statutes (or the predecessors) have provided the exclusive method of obtaining oil and gas leases on the lands at issue in this lawsuit for over fifty-five years.

B. Each of the Defendants in this case has purported to take steps to obtain permits to prospect and develop oil and gas on various tracts of land pursuant to Subchapter G of Chapter 52, Sections 52.221, et seq., of the Natural Resources Code. During January, 1983, Defendants caused to be recorded in the deed records of various counties in Texas, "Applications for Prospecting Permits" covering all the lands at issue in this cause. Copies of the applications are now in evidence before the Court in this cause. Defendants have filed such applications for prospecting permits on approximately 70,000 acres of Permanent University Fund land, 15,800 acres of Permanent School Fund land and 9,700 acres of Department of Correction land for a total of approximately 95,500 acres.

C. Defendants attempted to file the above-referenced applications with the General Land Office in January of 1983. Plaintiff Commissioner Mauro, through his authorized agents/representatives, rejected these filings and the letters evidencing such rejections are in evidence before the Court in this cause. Such rejections clearly reflect a final determination by Plaintiff Commissioner

Mauro that these applications have no force and effect under State of Texas law.

D. Plaintiffs would show that as a result of the filing of the "Applications for Prospecting Permits" by Defendants, Plaintiffs have either been unable to lease the above referenced lands for oil and gas purposes, or in those cases where any of such lands have been leased by the respective boards for lease, the lessees of such lands have refrained from carrying out drilling operations on such lands due to the cloud created on Plaintiffs' title by the above-referenced filings by Defendants.

E. Plaintiffs would further show that, as a matter of law and as stated in recent court decisions, the "Applications for Prospecting Permits" create no title or just claim to any interest in any of the lands covered by such applications in Defendants, and Defendants well know that fact. Further, Defendants well know that the filing of such applications in the deed records of the counties where the respective lands covered by the applications are located, has created a cloud on Plaintiffs' title to such lands, and such filings have indeed created a cloud on such title and should be removed by this Court.

III.

Alternatively, it is the purpose of this suit to seek a declaration from this Court regarding the obligations imposed upon Plaintiff Commissioner Mauro by Sections 52.221, et seq., Subchapter G, Chapter 52 of the Texas Natural Resources Code prior to their express repeal by the 68th Legislature of Texas on February 1, 1983.

A. Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code were general laws which were not applicable to Permanent School Fund Land, Permanent University Fund Land and Texas Department

of Corrections Land, which lands were then, and still are today, governed by separate specific statutes.

B. In the alternative, Plaintiff contends and seeks a declaration from this Court that such provisions of the Natural Resources code were without force and effect. The statutes from which those sections of the Natural Resources Code were purported to be derived had long previously been repealed. Such provisions of the Natural Resources Code were included in said Code by mistake or else to reflect the continuing rights of oil and gas leaseholders who had previously acquired their interest under valid permits. Those provisions of the Natural Resources Code were, therefore, without force and effect. Thus, Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code, were not valid and operable statutes for obtaining oil and gas prospecting permits, and oil and gas leases in conjunction therewith on Public Free School Land of the State of Texas, on Permanent University Fund Land and Texas Department of Corrections Land, but were null and void.

C. Alternatively, Sections 52.221, et seq. of Subchapter G, Chapter 52 of the Natural Resources Code were void and unconstitutional and in violation of Article III, Section 51, Article VII, Section 4, and Article VII, Section 12 of the Texas Constitution of 1876 as written and as applied.

D. Alternatively, Sections 52.221, et seq. of Subchapter G, Chapter 52 of the Natural Resources Code were void and unconstitutional because of being vague and indefinite.

E. Alternatively, if Sections 52.221, et seq., Subchapter G, Chapter 52, of the Natural Resources Code were otherwise valid and effective statutes, the repeal effective February 1, 1983, such provisions of the Natural Resources Code, abolished as of February 1, 1983, all pending applications for prospecting permits, prospecting

permits and the prospecting permit method of acquiring oil and gas leases on State Public Free School Land, Permanent University Fund Land and Texas Department of Corrections Land.

F. Alternatively, the prospecting permit leasing statutes, Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code, if otherwise effective statutes were repealed by implication on September 1, 1979, by Senate Bill 526, TEX.GEN. LAWS, Chapter 616, page 1377, insofar as lands belonging to the University of Texas Permanent University Funds are affected.

G. Alternatively, if Sections 52.221, et seq., Subchapter G, Chapter 52 of the Natural Resources Code were effective laws of Texas, then, under Sections 52.001.-52.153, Sections 32.001-32.111, and other applicable sections of the Natural Resources Code, and Sections 66.61, et seq. of the Education Code, the Commissioner of the General Land Office, the School Land Board, the Board for Lease of University Lands, or the Board for Lease of the Texas Department of Corrections, in his or their discretion, could determine whether to lease for oil and gas under the sealed bid method and public auction method, or under the prospecting permit method. The Commissioner of the General Land Office, and the various state leasing boards have exercised their discretion and elected to lease for oil and gas development the lands here involved under the sealed bid method and the public auction method.

VI.

Plaintiff, Commissioner Mauro, has not evaluated any of the subject applications on their merits but rather has only refused to accept them for filing for the reasons stated above. Plaintiff Commissioner Mauro reserves the right to make the determinations contemplated by the relevant statutes if it is determined that he is obligated to accept some or all of the applications for filing.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that this Court enter judgment declaring the Defendants' "Applications for Prospecting Permits" to be of no force effect, cancelling same, and removing the cloud on Plaintiffs' title cast by the filing of such applications.

In the alternative, and without waiving the foregoing, Plaintiffs prays that, upon final trial, this Court enter a declaratory judgment to effect that Sections 52.221, et seq. of the Natural Resources Code were general laws which did not apply to Permanent School Funds Land, Permanent University Fund Land and Texas Department of Corrections Land, and that such lands were then, and still are today, governed by separate specific statutes; or, alternatively, that Sections 52.221, et seq. of the Natural Resources Code were without force and effect; or, in the alternative, that no rights were created by such provisions with regard to any particular tract of land unless, and until, the School Land Board, the Board for Lease of University Lands, or other relevant leasing board, formally decided to make such tract of land available for leasing in that manner.

In the alternative, and without waiving the foregoing, Plaintiffs pray that this Court declare that no application filed with Plaintiff's Commissioner Mauro, after the effective date of the express repeal of Sections 52.221, et seq. of the Natural Resources Code need be considered by said Plaintiff for any purpose. Plaintiffs further pray that they be awarded cost of court, and such other and further relief as they may show themselves to be entitled to receive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Second Amended Original Petition was sent by Certified Mail, Return Receipt Requested, to Defendants Bryce E. Evans and Gil Hollingsworth, through their attorneys of record, Ronald O. Holman, Cippelle, Taylor, Holman & Robertson, 5949 Sherry Land, Suite 1135, Dalls, Texas 75225 on this the 20th day of April, 1988,.

(Signed)
JOSE MANUEL RANGEL

APPENDIX B

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	)	IN THE DISTRICT COURT OF
VS.	)	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	)	201ST JUDICIAL DISTRICT

SUPPLEMENTAL ANSWER OF DEFENDANTS' BRYCE E. EVANS AND GILL HOLLINGSWORTH

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRYCE E. EVANS and GIL HOLLINGSWORTH (hereinafter referred to collectively as "Defendants") and file this their Supplemental Answer and would show this Honorable Court as follows:

I.

Defendants would show the Court that Garry Mauro, Commissioner of the General Land Office, has failed to make a final decision concerning the validity and effect of the "Applications for Prospecting Permits" filed by the Defendants as well as the rights of the Defendants to obtain oil and gas prospectors permits (and oil and gas leases in conjunction therewith) on Permanent School Fund, Permanent University Fund and Texas Department of Corrections Lands. Defendants would further show that such Applications are still pending before Garry Mauro, Commissioner of the General Land Office as he has merely refused to accept such Applications. At the time such Applications were tendered to the General Land Office, Garry Mauro, Commissioner of the General Land Office, by and through his agents and/or representatives, rejected

the filings and confirmed such rejections in writing by presenting a letter to Defendants herein. The General Land Office has never accepted such Applications for filing. The General Land Office has never evaluated any of the subject Applications on their merits as required by Chapter 52, *Permits and Leases,* Sections 52.221, et seq., of the Natural Resources Code. Therefore, in the alternative, Defendants would show that the Commissioner of the General Land Office has not made a final decision which determines the rights of the Defendants pursuant to Chapter 52, Sections 52.221 et seq., of the Natural Resources Code.

WHEREFORE, PREMISES CONSIDERED, Defendant pray that this Court enter a Declaratory Judgment stating as follows:

1. The District Court lacks primary jurisdiction to hear this matter and the case should be dismissed;

2. Alternatively, Sections 52.221 et seq., of the Natural Resources Code were valid and in full force and effect and the Commissioner of the General Land Office should issue prospecting permits to the Defendants on each tract of land for which they filed an Application;

3. In the further alternative, Sections 52.221 et seq., of the Natural Resources Code were valid and in full force and effect and the Commissioner of the General Land Office should issue prospecting permits to Defendant Bryce E. Evans on all Texas Department of Corrections land;

4. For such other and further relief, at law or in equity, to which Defendants may show themselves justly entitled.

Respectfully submitted,

CIPPELE, TAYLOR, HOLMAN
& ROBERTSON

By (Signed)
Ronald O. Holman
State Bar Card No.: 09903600

5949 Sherry Lane, Suite 1135
Dallas, Texas 75225
(214/361-9494)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed by certified mail, return receipt requested or hand delivered, or federal expressed to Mr. Jose Manuel Rangel, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, Attorney for Plaintiff, on the 25th day of April, 1988.

(Signed)
Ronald O. Holman

APPENDIX C

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	§	201ST JUDICIAL DISTRICT

WRITTEN ARGUMENTS OF DEFENDANT, GIL HOLLINGSWORTH

COMES NOW Gil Hollingsworth, Defendant in the above-referenced cause and file these written arguments pursuant to this Court's letter dated March 9, 1988 and would show this Honorable Court as follows:

I.

Plaintiff, Garry Mauro, Commissioner of the General Land Office, has submitted this controversy to the jurisdiction of this Court by filing this lawsuit asking for declaratory relief rather than by handling the matter as a contested case under the Administrative Procedure and Texas Register Act (Article 6252-13a 13, V.A.T.S.). Therefore, this case is ripe for judicial consideration. The Courts of this State have declared that it is the duty of the trial courts to make the Uniform Declaratory Judgment Act and § 12 of the Administrative Procedure and Texas Register Act useful tools in the resolution of legal problems and controversies, regardless of which statutory provision is used. If a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue. *Bellegie v. Texas*

Board of Nurse Examiners, 685 S.W.2d 431, 434 (Tex.App. 1985, no writ). *Public Utility Commission of Texas, et al. v. City of Austin,* 728 S.W.2d 907 (Tex.App. — Austin 1987).

The evidence is undisputed that this Defendant followed the provisions of Subchapter G. of Chapter 52, Permits and Leases, Sections 52.221, et seq. of the Natural Resources Code as those sections affect his right to obtain oil and gas prospector's permits and oil and gas leases in conjunction therewith. After the prospecting permits were filed with the Commissioner in a timely manner, this lawsuit was filed. The Commissioner chose to file this lawsuit for a declaratory judgment rather than handling the applications as a contested case under § 13 of the Administrative Procedure and Texas Register Act (APTRA). For the Plaintiff to argue compliance with the notice, hearing and other procedures of § 13 of the APTRA is to make a sham and mockery of the purpose enunciated in the first section of the Act. Due to no fault of his own, this Defendant did not have a chance to be heard, let alone exhaust his remedies under the Act. Five years have passed since the filing of his applications. This Court has the power to resolve this issue and should declare that the Land Commissioner issue said permits to Defendant without delay.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays this Honorable Court enter a declaratory judgment stating that this Court has jurisdiction to hear this matter and that the Commissioner of the General Land Office should issue oil and gas prospecting permits to this Defendant on each tract of land on which he filed an application.

Respectfully submitted,

TOM SAWYER
2209 Hopi Trail
Austin, TX 78703
512/477-7559

ATTORNEY FOR GIL HOLLINGSWORTH

By (SIGNED)
Tom Sawyer
State Bar No. 17694500

APPENDIX D

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	X X X X X	IN THE DISTRICT COURT OF
VS.	X X	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS AND GIL HOLLINGSWORTH	X X X	201ST JUDICIAL DISTRICT

DEFENDANT'S FIRST MOTION FOR CONTINUANCE

COME NOW, Defendants, and makes this their first verified motion for continuance and say that they cannot go to trial in this case at its present setting, and in support thereof shows:

I.

The Defendants in this case, Bryce Evans and Gil Hollingsworth, has purported to take steps to obtain permits to prospect and develop oil and gas on over 100 tracts of land pursuant to Subchapter G of Chapter 52, Sections 52.221, et seq., of the Texas Natural Resources Code. It is the purpose of this suit to seek a declaration from this Court regarding the obligations imposed upon Plaintiff by those statutory provisions prior to their express repeal in 1983.

II.

Plaintiff and Defendants Bryce Evans and Gil Hollingsworth had until just recently agreed to abate all discovery in this suit pending the entering of final judgment in a companion case to the subject lawsuit involving identical

issues, styled: Jacqueline W. Allen and C. Ray Allen vs. Garry Mauro, Commissioner of the General Land Office, Cause No. B-32,417, in the 238th Judicial District Court of Midland County, Texas. The companion case has already been tried in the District Court and appealed to both the Court of Appeals, Eighth Supreme Judicial District of Texas, and the Supreme Court of Texas. The Supreme Court recently refused the Allen's Application For Writ of Error, with the notation n.r.e., and on August 7, 1987 the Court of Appeals issued mandate to the trial court.

III.

The Defendants recently requested Certificates of Fact from the Plaintiff for each tract of land that they have applied for a permit on, for use at the trial in this suit. Plaintiff estimated that it would take a minimum of 30 days, but more than likely as long as 3 months to prepare such Certificates of Facts. *See* Motion for Continuance previously filed by Plaintiff and granted by the Court.

IV.

Plaintiff has advised Defendants that the costs to prepare a Certificate of Facts for each tract of land would be prohibitive. Plaintiff has proposed to prepare a Stipulation setting forth the status of title to each tract of land with the opportunity for Defendants, or their counsel, to review and verify same. To date, the Stipulation has not been completed by Plaintiff and Defendants have not had an opportunity to review or verify same. On November 4, 1987, Defendants received from Plaintiff by federal express information relating to the ownership of tracts of land at issue in the lawsuit. A true and correct copy of the Plaintiff's cover letter is attached hereto, marked Exhibit "A" and is made a part hereof for all purposes. Such letter states that Plaintiff was enclosing a copy of its First Amended Original Petition; however, Defendants did not receive a copy of same and do not have any idea what amendments or new

and additional causes of action have been alleged by the Plaintiff. Defendants have not had and will not have sufficient time to check with the General Land Office to verify the ownership in order that a Stipulation by the parties can be prepared and filed with the Court. Once a Stipulation has been agreed to by counsel for Plaintiff and Defendants, and filed with the Court the issues will be narrowed and the case can be disposed of by summary judgment. It is anticipated that an agreed Stipulation can be prepared and filed with the Court within 60 days.

V.

Counsel for Plaintiff has not agreed to this continuance.

VI.

This continuance is not sought for delay, but so that justice may be done.

WHEREFORE Defendants request that the above-entitled and numbered cause be removed from its present setting and not be reset for 60 days.

Respectfully submitted,

CIPPELE, TAYLOR,
HOLMAN & ROBERTSON
5949 Sherry Lane, Suite 1135
Dallas, Texas 75225
(214/361-9494)

By (Signed)
Ronald O. Holman
State Bar Card No.: 09903600

ATTORNEYS FOR DEFENDANTS,
BRYCE E. EVANS AND
GIL HOLLINGSWORTH

VERIFICATION

STATE OF TEXAS §

§

COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appears RONALD O. HOLMAN, who by me duly sworn on his oath deposed and said that he is duly qualified in all respects to make this verification, that he has read the above and foregoing Defendants' First Motion for Continuance, and that every statement contained therein is within his personal knowledge and true and correct.

(Signed)
RONALD O. HOLMAN

SUBSCRIBED AND SWORN TO BEFORE ME on this the 4th day of November, 1987, to certify which witness my hand and official seal.

(S E A L)

(Signed)
Notary Public in and for
the State of Texas

My Commission Expires:
11/05/90

Lee Ann Royer
(Print/Type Notary Name)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has this 4th day of November, 1987, been mailed by certified mail, return receipt requested to all counsel of record.

(Signed)_____
Ronald O. Holman

APPENDIX E

NO. 344,540-A

GARRY MAURO, COMMISSIONER OF THE GENERAL LAND OFFICE	)	IN THE DISTRICT COURT OF
VS	)	TRAVIS COUNTY, TEXAS
BRYCE E. EVANS GIL HOLLINGSWORTH	)	201ST JUDICIAL DISTRICT

before
Hon. Hume Cofer, Judge Presiding

STATEMENT OF FACT

On the 15th day of December, 1987, in the 201st Judicial District Court of Travis County, Texas, a trial was commenced in the above-styled and numbered cause, whereupon the following proceedings were had and the following evidence introduced:

APPEARANCES:

JIM MATTOX, Attorney General of Texas, by Mr. Jose Manuel Rangel, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548
appearing on behalf of Plaintiffs;

CIPPELE, TAYLOR, HOLMAN & ROBERTSON, by Mr. Ronald O. Holman, 5949 Sherry Lane, Suite 1135 Dallas, Texas 75225
appearing on behalf of Defendants.

PAGE 13/LINE 21 THROUGH PAGE 14/LINE 16

MR. HOLMAN: . . . .

There is a companion case, which is the *Allen* case, which counsel for plaintiff has presented to you, which has ruled in part on some of the land that is the subject of this lawsuit. Those are two types of lands, lands, owned or dedicated to the University of Texas, and secondly land dedicated to the permanent school fund.

Some of the applications that we will introduce into evidence cover University of Texas land and permanent school fund lands. However, the distinction in this case factually from the distinction in the *Allen* case is we have land that is not owned by the State of Texas as permanent school fund land or by the University of Texas as public school land, but is rather owned by a state agency which is a Department of Corrections land. Then we also have a fourth category of land, which is land on Matagorda Island.

Neither land covered on Maragorda Island nor land owned by the Texas Department of Corrections was covered by the prior opinion. . . .

APPENDIX F

September 15, 1988

Mr. Jose Manuel Rangel
Assistant Attorney General
Energy Division
P. O. Box 12548
Austin, Texas 78711-2548

Mr. Ronald O. Holman
5949 Sherry Lane, Suite 1135
Dallas, Texas 75225

Mr. Tom Sawyer
2209 Hopi Trial
Austin, Texas 78703

Mr. Benny J. Lowe
3108 North Big Spring, Suite 105
Midland, Texas 79701

Re: Mauro v. Evans and Hollingsworth,
No. 344, 540-A

Gentlemen:

Plaintiffs' amended petition seeking to clear the title to the land in question changes the nature of this case. My March 9, 1988 decision that the parties were seeking an advisory decision would not be proper in this case as it is now pleaded.

I concluded that *Allen v. Mauro* correctly states the applicable law and that the principle of that decision applies also to the Texas Department of Corrections land. The statute relied on by defendants and the statutes under which school, University, and TDC land has been leased can be and should be reconciled as stated by *Allen v. Mauro.* The Commissioner acted correctly when he refused to accept defendants' applications.

Judgment will be rendered for plaintiff cancelling the Applications filed in each County and removing the cloud on plaintiffs' title resulting from the filing of such applications. Judgment will also be rendered that plaintiffs and defendants take nothing by their respective actions for declaratory judgment.

The Attorney General should draft the judgment and submit it to opposing counsel. The judgment should only state the result. Conclusions of law will be stated separately if they are requested. As indicated above, they will be based on the opinion in *Allen v. Mauro.*

About 10 days after the Attorney General submits a draft of the judgment to opposing counsel, I will sign the judgment if it is in proper form and if I am not advised of any objection to the draft submitted by the Attorney General.

Very truly yours,

SIGNED

HUME COFER

Judge, 98th District Court

Travis County, Texas

HC/ca

APPENDIX G

NO. C-9715

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

GIL HOLLINGSWORTH,

Petitioner

VS.

GARRY MAURO,
IN HIS CAPACITIES AS COMMISSIONER OF THE GENERAL LAND OFFICE AND CHAIRMAN OF THE SCHOOL LAND BOARD, THE BOARD FOR LEASE OF UNIVERSITY LANDS AND THE BOARD FOR LEASE OF THE DEPARTMENT OF CORRECTIONS; THE STATE OF TEXAS; THE SCHOOL LAND BOARD; THE BOARD FOR LEASE OF UNIVERSITY LANDS; AND, THE BOARD FOR LEASE OF THE DEPARTMENT OF CORRECTIONS,

Respondents

PETITIONER HOLLINGSWORTH'S MOTION TO SEVER AND MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Gil Hollingsworth, Petitioner in this cause, and files this his Motion to Sever and Motion for Rehearing, urging the Court to vacate and set aside its order denying Petitioner's Application for Writ of Error rendered on December 5, 1990; to grant Petitioner's Motion to Sever his claims from those of Petitioner Bryce Evans; and to grant a rehearing of the merits of Petitioner's appeal from the judgment rendered against him by the courts below. In support of this Motion to Sever and Motion for

Rehearing, Petitioner would respectfully show the Supreme Court as follows:

STATEMENT OF POINTS OF ERROR

POINT OF ERROR NUMBER ONE

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE TRIAL COURT ERRED IN FAILING AND REFUSING TO DISMISS OR STAY THIS LAWSUIT FOR LACK OF JURISDICTION, BECAUSE THE PLAINTIFF COMMISSIONER OF THE GENERAL LAND OFFICE DID NOT COMPLY WITH THE HEARING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE AND TEXAS REGISTER ACT (APTRA), AND DID NOT MAKE A "FINAL DECISION" UNDER APTRA AS TO THE MERITS OF PETITIONER'S OIL AND GAS PROSPECTING PERMIT APPLICATIONS, AND SUCH A DECISION IS REQUIRED BEFORE JURISDICTION WILL LIE WITH THE DISTRICT COURT. (TR 420; Supp. TR 2; opinion of the court of appeals)

POINT OF ERROR NUMBER TWO

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT AS A MATTER OF LAW, THE FAILURE BY THE PLAINTIFF COMMISSIONER OF THE GENERAL LAND OFFICE TO COMPLY WITH THE HEARING REQUIREMENTS OF APTRA DEPRIVED APPELLANTS OF DUE PROCESS OF LAW.

POINT OF ERROR NUMBER THREE

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S JUDGMENT THAT PETITIONER'S APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS ARE NULL AND VOID, BECAUSE AS A MAT-

TER OF LAW SUBCHAPTER G OF CHAPTER 52 OF THE NATURAL RESOURCES CODE WAS VALID, ENFORCEABLE, AND APPLICABLE TO THE LANDS FOR WHICH PETITIONER SOUGHT PERMIT, AND THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT PETITIONER COMPLIED WITH ALL THE STATUTORY REQUIREMENTS FOR THE MANDATORY ISSUANCE OF SUCH PERMITS BY THE COMMISSIONER OF THE GENERAL LAND OFFICE. (TR 420; Supp. TR 2; opinion of court of appeals)

POINT OF ERROR NUMBER FOUR

THE SUPREME COURT ERRED IN FAILING TO HOLD THAT THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE COMMISSIONER OF THE GENERAL LAND OFFICE IS ESTOPPED AS A MATTER OF LAW FROM REFUSING TO FILE PETITIONER'S APPLICATIONS FOR OIL AND GAS PROSPECTING PERMITS AND FROM REFUSING TO ISSUE SUCH PERMITS TO PETITIONER, BECAUSE THE ONLY REASON THAT WAS STATED TO PETITIONER AT THE TIME OF THE REFUSAL WAS THAT SUBCHAPTER G WAS "INVALID," AND AS A MATTER OF LAW THAT WAS INCORRECT AND DID NOT CONSTITUTE A LAWFUL BASIS FOR THE REFUSAL. (TR 420; Supp. TR 2; opinion of court of appeals)

ARGUMENT AND AUTHORITIES PERTINENT TO ALL POINTS OF ERROR IN PETITIONER'S MOTION TO SEVER AND MOTION FOR REHEARING

I. MOTION TO SEVER AND REHEAR PETITIONER HOLLINGSWORTH'S APPLICATION

A. Commissioner Mauro's Letter to This Court Was Improper and Prejudicial

Petitioner Hollingsworth urges this Court to reconsider its denial of his Application for Writ of Error particularly in light of the highly improper and prejudicial letter sent to this Court by Respondent Garry Mauro, Commissioner of the General Land Office, on November 30, 1990, and this Court's subsequent denial of Petitioner's Writ just six days later, on December 5, 1990. (Commissioner Mauro's letter is attached as Appendix A)

Commissioner Mauro wrote the Court allegedly out of concern for investors who apparently have purchased interests in the prospecting claims in dispute in this case from Petitioner Bryce Evans. Such a personal, blatantly prejudicial communication with the court by a party represented by counsel is completely improper, a fact of which Commissioner Mauro, himself a lawyer, should be well aware. Furthermore, the facts which he alleges in his letter are outside the record in this case and are unsubstantiated by any evidence. Finally, even assuming the accusations of wrongdoing which Commissioner Mauro has leveled against Mr. Evans to be true, there have been no such accusations made against Mr. Hollingsworth, nor even any insinuation or hint of impropriety on his part in pursuing his legitimate permit claims under Subchapter G of Chapter 52 of the Natural Resources Code. Mr. Hollingsworth is guilty only of attempting to enforce his rights under the laws of the State of Texas, and it is difficult to avoid the conclusion that those rights have been severely and unfairly prejudiced by Commissioner Mauro's letter.

Texas law is clear: "Any person may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." TEX.R.CIV.PRO.7 (emphasis added). As the word "or" in this rule makes clear, the right to represent oneself and the right to representation by an attorney are mutually exclusive alternatives:

> A party who appears by counsel has no right to personally conduct, or assist in conducting,

> litigation of his own case. ... [A] party has no right to hybrid representation.

In re Moody, 105 Bankr. 368 (S.D. Tex. 1989)(emphasis added). In the *Moody* case, the court ordered all papers filed by the defendant before he informed the court that he had discharged his attorney and would be proceeding pro se to be stricken from the record.

Commissioner Mauro and the other Respondents are represented by the Attorney General of the State of Texas and have been throughout the entire course of this dispute. For Commissioner Mauro to take it upon himself, at this late stage of the litigation, to "bring[]... special circumstances and concerns to the Court's attention," circumstances and concerns entirely outside the record in the case, constitutes a flagrant violation of the rule against hybrid representation. As a lawyer Commissioner Mauro ought to be aware of the prohibition against such informal, personal pleas to the court: Texas disciplinary Rule of Professional Conduct 3.05(a) forbids a lawyer to "seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure."

Putting aside the impropriety of Commissioner Mauro's even sending such a letter, his submission for the Court's consideration of alleged facts never before presented in this case violates basic procedural and evidentiary rules. Texas Rule of Appellate Procedure 50(a) states that "[t]he record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts." As the El Paso court has put it, "The duty of [appellate courts] is to consider only the testimony adduced and/or the evidence admitted at the time of trial on which the judgment of the trial Court is based." *Gulf Oil Corp. v. Southland Royalty Co.,* 478 S.W.2d 583, 591 (Tex. Civ. App. — El Paso 1972), aff'd 496 S.W.2d 547 (1973). Clearly this does not include a letter, sent to the Court by a party represented by counsel eight months after the Application for Writ of Error was

filed, alleging facts wholly outside the record in the case. Petitioner's Application for Writ of Error had been on file for eight months when Commissioner Mauro sent his November 30, 1990 letter. Six days (three business days) later, the Court denied the Writ. Since it did so without an accompanying opinion, Petitioner has no way of knowing the basis or bases for its decision. But Petitioner would urge that the denial, coming so quickly on the heels of Commissioner Mauro's letter, creates the strong impression that the Court's decision was influenced by if not in direct response to, the letter. Given the impropriety of both the submission and contents of the letter, the Court should correct that impression by granting Petitioner's Motion for Rehearing.

B. Petitioner Hollingsworth's Application Should Be Severed and Addressed on Its Own Merits

Assuming for the sake of argument only that Commissioner Mauro's letter properly was before this Court, the serious accusations made by Commissioner Mauro against Mr. Evans clearly were extremely prejudicial to the claims of Mr. Hollingsworth, who is not accused of, and is not guilty of, any wrongdoing whatsoever. Counsel for Mr. Hollingsworth no longer represents Mr. Evans, and Mr. Hollingsworth is not associated with him in any way, other than having filed similar permit leasing claims shortly before the repeal of Subchapter G and having been made common defendants in Commissioner Mauro's lawsuit.

Petitioner Hollingsworth is entitled to have this Court consider his claims on the merits, uninfluenced by improper communications with the Court or accusations outside the record against his former co-Petitioner. It is difficult in light of Commissioner Mauro's and the Court's actions, to believe that he has received the due process he is entitled to — either at the General Land Office, or now in the court system. Petitioner Hollingsworth therefore

requests that the Court sever his claims from those of Petitioner Evans for separate consideration on the merits.

II. THE MERITS OF PETITIONER HOLLINGSWORTH'S CLAIMS HAVE BEEN DISREGARDED TO PROTECT THE STATE FROM A "MISTAKEN" STATUTE

A. The Statutory Construction Issues

Petitioner Hollingsworth will not repeat all of his arguments and authorities which mandate the reversal of the lower courts' strained reasoning and unsupportable rulings in favor of the State of Texas in this case. The main points, however, merit reiteration.

The lower courts' decisions to deny either a mandatory statutory remedy or even an administrative hearing to Petitioner Hollingsworth obviously reflect an understandable concern for protecting the State of Texas from the discomfort of having to live up to what was a supposedly "mistaken" legislative enactment, i.e., the 1977 re-enactment of the permit leasing statutes in Subchapter G. The court of appeals' reasoning in support of its decision, however — no matter how sophisticated it may appear superficially — disregards the unambiguous statutory language in Subchapter C and the applicable rules of statutory construction.

The first part of the opinion of the court of appeals correctly describes the nature of the parties' dispute, and also notes, correctly, that Subchapter G, by its express terms, did apply to university and public school lands.

The court of appeals's opinion, however, then proceeds to disregard these clear indications of legislative intent, never explaining how or why it does so. The opinion's lengthy discussion of earlier laws governing leasing of state lands overlooks the fact that the 1977 enactment of

Subchapter G (along with the other provisions of Chapter 52 and the remainder of the Code) was subsequent to all the other leasing statutes referred to, and that by its terms (as the court of appeals initially recognized) Subchapter G clearly included the lands on which Mr. Hollingsworth — in reliance on the law as enacted — filed permit applications. Compare *Duval Corp. v. Sadler*, 4067 S.W.2d 493, 497 (Tex. 1966)(discussed in Petitioner's letter brief to this Court on August 31, 1990.)

While the provisions of the prior statutes may bear on the correct construction that should be applied to Subchapter G, the court of appeals erroneously attempted to selectively impose isolated provisions of such long-repealed statutes onto the 1977 Code provisions. The result is a flawed analysis, as on page 6 of the court's opinion, where it states that:

> The permit system of Subchapter G is absolutely inconsistent with the competitive-bid system established in the subsequent legislation mentioned above [i.e., the legislation creating boards for lease of various state lands]. After university lands, public school lands, and lands belonging to the Department of Corrections were explicitly made the subject of competitive bidding, no later enactment ever placed such lands back within the scope of the statutes that became Subchapter G.

This reasoning begs the question because Subchapter G is itself such a "later enactment." There were no existing statutes "that became Subchapter G" because the earlier permit-leasing statutes had long since been repealed. As the court of appeals expressly notes elsewhere in its opinion, the Legislature in 1931 unqualifiedly repealed Article 5538 in its entirety. (See page 9 of the Court's opinion, discussing 1931 Tex.Gen.Laws, ch. 271, 13). As a result, the

1977 enactment of Subchapter G was a new statute, not an "amendment" to an existing Article 5538.

Therefore, if the court of appeals is correct that the permit-leasing system of Subchapter G is "absolutely inconsistent" with the competitive-bid statutes, then the later 1977 enactment must be controlling.

The Code Construction Act, in TEX.GOVT.CODE § 311.025, provides that "if statutes enacted at the same or different sessions of the Legislature are irreconcilable, the statute latest in date of enactment prevails." (emphasis added)

Even if a "general/special" analysis is applied, the Code Construction Act, in TEX.GOVT.CODE § 311.026(a), requires that "[i]f a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both." The court of appeals does not explain why it is not possible to give effect to both the permit-leasing provisions and the competitive-bid provisions in this case, which when read together, merely created alternative methods of leasing State lands during the period from 1977 to 1983, at least where the tracts of land in question were not leased and were not in the competitive-bid process at the time Petitioner Hollingsworth filed his permit applications.

Section 311.026(b) of the Code Construction Act further provides that "[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail." As the court of appeals noted on page 5 of its opinion, the legislature clearly manifested its intent in TEX.NAT.RES.CODE §52.241 that Subchapter G did apply to university and public school lands. Thus, even if the "general" permit-leasing statutes enacted in 1977 con-

flicted irreconcilably with the "special" earlier-enacted competitive-bid statutes, then the later-enacted provision must prevail.

The opinion of the court of appeals further fails to address the constitutional prohibition, set forth in TEX.CONST. art. 3, §56, against the enactment of "any local or special law" regulating the raising of money for public schools, or any other "local or special law" in cases where a "general law can be made applicable" (emphasis added). Further, the court of appeals does not explain or resolve the peculiar result that if Subchapter G did not apply to any lands otherwise subject to a competitive-bid process, then it did not apply to any state lands, and it would thereby be rendered totally meaningless, contrary to the mandate of TEX.GOVT.CODE §311.021(2) ("In enacting a statute, it is presumed that...the entire statute in intended to be effective.").

In summary, the court of appeals has disregarded what the court itself recognizes as the unambiguous language of Subchapter G providing for permit leasing of the lands in question, and has also failed to apply the controlling rules of statutory construction, in order to arrive at a result which will protect the State of Texas from having to issue prospecting permits to Mr. Hollingsworth (and Mr. Evans). It is not the role of the courts to protect the State from unwise, wrongheaded, or even supposedly "mistaken" actions by the Legislature. See *American Indemnity Co. v. City of Austin,* 246 S.W. 1019 (Tex. 1922); *Waters v. Gunn,* 218 S.W.2d 235 (Tex.Civ.App. — Amarillo 1949, writ ref'd n.r.e.); *Criminal District Attorney, Tyler County v. Commissioner's Court of Tyler County,* 753 S.W.2d 514 (Tex.App. — Beaumont 1988, writ denied).

In this case in particular, the courts need not attempt to undo or construe away the effect of clear statutory language. The Legislature itself properly acted in 1983 to repeal what it had enacted in 1977 — but the vested rights

of Petitioner Hollingsworth could not thereby be divested. See TEX.GOVT.CODE § 311.031(a)(1) ("the...repeal of a statute does not affect...the prior operation of the statute or any prior action taken under it").

This Court should apply and enforce the statutory law as it was enacted in 1977, and should not attempt to rewrite the law to suit the desires of the State or its officers who do not want to abide by its terms. The judgments of the court below should be reversed; Subchapter G should be declared valid and applicable to the tracts of surveyed state land in question at the time Petitioner filed his permit applications; and the Commissioner of the General Land Office should be directed to comply with the mandatory directive of the law to issue permits to Petitioner to explore for oil and gas on those tracts.

B. Estoppel

The Commissioner and the State are estopped from relying on any grounds for the refusal to issue the permits other than that Subchapter G was "invalid," because that was the only alleged ground stated in the General Land Office's letters to Petitioner when his applications were refused in early 1983. Not until after the El Paso Court of APpeals specifically held in *Allen v. Mauro,* 733 S.W.2d 228 (Tex.App. — El Paso 1986, writ ref'd. n.r.e.), that Subchapter G was valid, did the Commissioner then claim that other grounds existed for rejecting Petitioner's permit applications.

The Austin Court of Appeals, like the El Paso court, has now held that Subchapter G was valid, but, like the El Paso court, has further held that it did not apply to the lands in question (nor, apparently, to any sate lands). Unlike the permit-seekers in the *Allen* case, however, Petitioner here has raised the estoppel doctrine to preclude the State and the Commissioner from changing their position years after the fact of refusal.

Once a State agency has stated a basis for its action or refusal to act in a proprietary matter, or has taken a position on which citizens involved in a proprietary dispute with the State agency have relied, the State is estopped from adopting a new, different, or inconsistent position to try to avoid the effect of its prior position. See *City of Corpus Christi v. Gregg*, 289 S.W.2d 746, 750-53 (Tex. 1956); *State v. Bryan*, 210 S.W.2d 455, 464 (Tex.Civ.App.—Austin 1948, writ ref'd n.r.e.); *Glasscock v. Permian Oil Co.*, 185 S.W.2d 740 (Tex.Civ.App. — El Paso 1944, writ ref'd w.o.m.); *Clear Lake City Water Authority v. Winograd*, 695 S.W.2d 632 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Since no other basis for refusing to accept Petitioner's permit applications was given, and since the Commissioner himself initiated this lawsuit on the sole premise that Subchapter G was "invalid," the Court should hold that he and the State are estopped from relying on any other grounds to deny the permits - - and should hold that the permits must therefore be issued to Petitioner.

C. Jurisdiction: Failure To Comply With APTRA

As Petitioner has previously pointed out, it was improper for Commissioner Mauro and the General Land Office to refuse to accept Petitioner's permit applications and to then immediately file a declaratory judgment suit in an attempt to have the courts declare Subchapter G invalid or unconstitutional. The courts have no jurisdiction or authority to give advisory opinions on factual, legal, or even constitutional questions when such issues arise in contested matters committed by the Legislature to initial determination by the administrative agency concerned. See *Short v. W. T. Carter & Brother*, 126 S.W.2d 953, 962 (Tex. 1938) (courts have no jurisdiction to decide issues concerning compliance with leasing statutes until Land Commissioner makes primary determinations as to whether the lands applied for fall within the terms of the statute

and whether the applications are in order); *Jester Development Corp. v. Travis County Appraisal District,* 775 S.W.2d 464 (Tex.App. — Austin 1989, no writ hist.) (courts have no jurisdiction to give advisory opinions on constitutional questions not addressed by the agency in the first instance).

Respondents' contention that this is a cloud-on-title or trespass-to-try-title case is itself nothing more than a smokescreen. The main issue in this case, as the court of appeals recognized, is whether Subchapter G of Chapter 52 of the Natural Resources Code was valid, enforceable and applicable to the lands for which Petitioner sought permits. While a lawsuit to determine the effect of claims on state lands may be available in some instances, it must be brought pursuant to the governing statutes. For instance, Section 11.077 of the Natural Resources Code provides:

> If any public land is held, occupied, or claimed adversely to the state or to any fund of the state by any person or if land is forfeited to the state for any reason, the attorney general shall file suit for the land, for rent on the land, and to recover damages to the land.

This provision, like all other Code provisions, must be construed and enforced in its statutory context, not in isolation.

Since the Revisor's Note to Section 1.002 of the Natural Resources Code states that the Code is subject to the requirements of the Administrative Procedures and Texas Register Act (APTRA), TEX.REV.CIV.STAT.ANN. art. 6252-13a, the Commissioner of the General Land Office clearly is obligated to comply with the Act with regard to this dispute before bringing an alleged "title" suit.

Under the provisions of APTRA, the Commissioner was required to set this matter for a hearing as a "contested

case" where all factual and legal issues could be heard and fully addressed. See art. 6252-13a §§ 3, 13. Until such a procedure is completed, with a "final decision" based on specific findings of fact and conclusions of law, the courts do not have jurisdiction to review or decide the issues in dispute in this case. See art. 6252-13a § 16. See also *Logan v. Armstrong,* 694 S.W.2d 68 (Tex.App. — Corpus Christi 1985, no writ).

This Court very recently held that the failure of a trial court to permit discovery or to grant a continuance, prior to a sudden venue hearing, deprived a litigant if its "fundamental due process right to notice and a hearing." *Union Carbide Corp. v. Moye,* 34 Tx.S.Ct.J. 111, 113 (Tex., Nov. 21, 1990). The APTRA procedural requirements are specifically designed to prevent such a deprivation in contested administrative disputes. This Court should at least remand this case to the General Land Office to comply with APTRA.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner Hollingsworth prays:

(1) that the Court grant Petitioner's Motion to sever his claims from those of Petitioner Evans; and

(2) that the Court grant Petitioner's Motion for Rehearing, and upon rehearing, that the Court grant Petitioner's Application for Writ of Error; and

(3) that the Court reverse the judgment of the trial court and declare that the applications for prospecting permits filed by Petitioner are valid and effective and that Commissioner Mauro should issue permits to Petitioner pursuant to the provisions of subchapter G; or

(4) in the alternative, that the Court reverse the judgments of the lower courts and order that this lawsuit be stayed or abated for lack of jurisdiction, or in the alternative remanded to the General Land Office, so that the requirements of the Administrative Procedure and Texas Register Act can be fully complied with by Commissioner Mauro and the General Land Office.

Respectively submitted,

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